IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. **76-809**

THOMAS BRENNAN, et al.,

Petitioners,

v.

KEVIN ARMSTRONG, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners are the individual members of the Board of School Directors of the City of Milwaukee, the Superintendent of Schools, and the Secretary-Business Manager of Schools. They pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 23, 1976.

OPINIONS BELOW

The July 23, 1976 opinion of the United States Court of Appeals for the Seventh Circuit is reported at 539 F.2d 625 and is reproduced in the Appendix at pages 1-20. The order denying petitioners' Petition for Rehearing in Banc was entered on September 22, 1976, without opinion, and is reproduced in the Appendix at page 21. The January 19, 1976 opinion of the United States District Court for the Eastern District of Wisconsin is reported at 408 F.Supp. 765, and is reproduced in the Appendix at pages 22-139. The Partial Judgment entered by the United States District Court for the Eastern District of Wisconsin on January 19, 1976 is not reported but is reproduced in the Appendix at pages 140-141. The orders of the District Court specifying desegregation guidelines are reported at 416 F.Supp. 1344 and 416 F.Supp. 1347, and are reproduced in the Appendix at pages 142-151.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 23, 1976. A timely petition for rehearing in banc was denied on September 22, 1976, and this petition for certiorari will be filed within 90 days of the date of denial. This Court's jurisdiction is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1) and Rule 22(3) of the Supreme Court Rules.

QUESTIONS PRESENTED

1. Does a school district which adopted a neighborhood school policy decades before substantial numbers of black students resided in the district and which later develops non-governmentally caused residential racial concentration violate the Constitution by uniformly and consistently adhering to that neighborhood school policy in the good faith belief that it provides the best educational opportunity for all students regardless of race?

2. In such a district, does a school board which in good faith believes that a neighborhood school policy provides the best educational opportunity for all students regardless of race evidence segregative intent by not adopting programs inconsistent with that policy even though they will improve student racial balance?

3. In a school desegregation case, if the court does not identify any school as "segregated" as defined in *Keyes v. School District No. 1* and specific references are made to only a few of the more than 150 schools in the district, may the court hold the entire school system unconstitutionally segregated and order a complete dismantling of the system and approximate district-wide student and faculty racial ratios in each school?

4. Did the Circuit Court err in applying the "clearly erroneous" standard of review to ultimate and conclusory findings of the District Court?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment to the United States Constitution, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

20 U.S.C. Section 1701(a) (Supp. V, 1976)[1] provides in relevant part:

"The Congress declares it to be the policy of the United States that –

. . .

"(2) the neighborhood is the appropriate basis for determining public school assignments."

20 U.S.C. Section 1704 (Supp. V, 1976) provides:

"The failure of an educational agency to attain a balance, on the basis of race, color, sex, or national origin, of students among its schools shall not constitute a denial of equal educational opportunity or equal protection of the laws."

20 U.S.C. Section 1705 (Supp. V, 1976) provides:

"Subject to the other provisions of this subchapter, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex, or national origin, or the school to which such student is assigned was

1. 20 U.S.C. Sections 1701-1758 were enacted as part of the Education Amendments of 1974 to the Elementary and Secondary Education Act of 1965. Act of August 21, 1974, Pub.L. No. 93-380, Title II, Sections 201-259, 88 Stat. 514-521. Section 201 of the Act provided that this title may be cited as the "Equal Educational Opportunity Act of 1974."

located on its site for the purpose of segregating students on such basis."

20 U.S.C. Section 1712 (Supp. V, 1976) provides:

"In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws."

20 U.S.C. Section 1752 (Supp. V, 1976) provides:

"Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of such orders shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on June 30, 1978."

STATEMENT OF THE CASE

This petition presents for decision an unsettled legal issue of significance to every resident of a school district with a neighborhood school policy and racial residential

concentration.[2] Given the District Court's specific findings of uniform and consistent good faith adherence by the Board to its neighborhood school policy, and the sound educational reasons for the innumerable consistent decisions made during the policy's more than fifty year history, it is unlikely that this Court will ever be presented with a clearer neighborhood school policy case.

Both the District and Circuit Courts phrased their conclusions in terms of the *Keyes* intent test; the phrasing, however, is more form than substance – more obfuscating than illuminating. If *Keyes* is controlling, the District Court's conclusion is wholly inconsistent with its findings of fact and the Circuit Court's affirmance perpetuates this error. In fact, the decisions of both courts makes sense only if (a) a racially neutral neighborhood school policy is unconstitutional *per se* in districts with racial residential concentration or (b) the courts' conclusions are based on a statistical, foreseeability approach to intent, without regard to purpose or motivation.

A. Procedural History

This action originated in 1965 with the filing of a complaint seeking declaratory and injunctive relief concerning various alleged acts of the Board of School Directors of the City of Milwaukee, its Superintendent, its Secretary-Business Manager and the individual members of that body (hereinafter collectively referred to as "the Board"). The Board was alleged to have violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Federal jurisdiction was invoked under 28 U.S.C. Section 1343, the jurisdictional counterpart of 42 U.S.C. Section 1983. The plaintiffs were certain black and white students and their parents, who were class representatives.

2. This Court in *Keyes v. School District No. 1*, 413 U.S. 189 (1973) specifically reserved the constitutionality of unmanipulated neighborhood school policies. *See* p. 14, *infra.*

Thirty trial days were concluded on January 31, 1974. Almost two years later, on January 19, 1976, the District Court for the Eastern District of Wisconsin entered and filed a Decision and Order (including Findings of Fact and Conclusions of Law) and a Partial Judgment concluding that the Board "engaged in practices with the intent and for the purpose of creating and maintaining a segregated school system, and that such practices had the effect of causing current conditions of segregation in the Milwaukee public schools" (A. 125).[3] The Board was enjoined from discriminating upon the basis of race in the operation of the schools and from "creating, promoting, or maintaining racial segregation" (A. 141).

In certifying the case for appeal pursuant to 28 U.S.C. Section 1292(b), the District Court concluded that "[t]he issues here decided are of public importance, concerning as they do the duties imposed upon school officials by the Constitution" (A. 139). A petition for permission to appeal was filed with the United States Court of Appeals for the Seventh Circuit on January 29, 1976. Permission was granted on February 4, 1976 (Misc. No. 76-8005). A panel of the Circuit Court consisting of Judges Philip W. Tone, Harlington Wood, Jr. and Robert A. Grant affirmed the District Court decision on July 23, 1976. A timely petition for rehearing in banc was denied without opinion on September 22, 1976.

B. Description of the Milwaukee Public School System and Its Policies.

The Milwaukee school system, whose boundaries are coterminus with those of the City, is one of the fifteen largest public school systems in the United States (155 schools and approximately 128,000 students in 1973) (A. 2, 40). Since 1950, Milwaukee's geographic area and total

3. A. ___ references are to the Appendix which is bound separately.

All references to pp. 36-113 of the Appendix are to specific findings of fact of the District Court.

student population has doubled and the number of schools has increased 71% (A. 2, 40).

Between 1950 and 1970 the City's black population multiplied fivefold from 3.5% (21,722) to 14.5% (105,088) of the total population (A. 2, 40-41). During that same period, the number and percentage of black students rose at almost twice that rate, with blacks comprising about 35% of the student population at the time of trial (A. 2-3, 41).

The overwhelming majority of Milwaukee's black population has tended to reside in an area in the north central and northwestern central part of the City (A. 41). Neither "state action" nor racially imbalanced schools have caused the racial residential concentration (A. 132). Black residential concentration has been determined primarily by the occurrence of residential vacancies in combination with the particular needs, desires, and incomes of black citizens (A. 42-43).[4] No statute, local regulation, policy or ordinance requiring segregation of the races has ever existed in Wisconsin or Milwaukee.

In 1919, long before the presence of any significant number of black students, the Board adopted a neighborhood school policy. Subsequent Boards have consistently adhered to that policy, in the good faith belief that it provides Milwaukee's students with the best possible education which limited available resources permit (A. 43-44, 102). The

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4. These findings of the District Court correspond to the recent recognition by three members of this Court that

> "[t]he principal cause of racial and ethnic imbalance in urban public schools across the country – North and South – is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. . . . Economic pressures and voluntary preferences [footnote omitted] are the primary determinants of residential patterns." *Austin Independent School District v. United States*, No. 76-200, December 6, 1976 (Burger, Powell and Rehnquist, concurring) (hereinafter cited as *Austin*).

neighborhood school policy has determined how and where Milwaukee students are educated, including decisions on new school site selection, construction, school remodeling, school building additions, and actions taken to meet the increased crowding in the schools during the 1950's and early 1960's (A. 44).

Milwaukee school officials have been generally aware of residential racial concentration patterns since the 1950's and have understood that adherence to the neighborhood school policy would result in a number of schools with predominantly non-white student bodies (A. 102). Although school officials have considered certain systemic changes in an attempt to achieve more racially balanced schools (A. 102), they have refused to mandate greater racial balance through non-voluntary means because, *inter alia*, it would necessitate abandonment of the neighborhood school policy (A. 103).

C. Decision of the District Court

The District Court's conclusion that the Board intended to create and maintain a segregated school system is wholly inconsistent with its own specific findings of fact that:

> (1) "The Board has consistently and uniformly adhered to a 'neighborhood school policy,' first developed in 1919. The essence of that policy has been the assignment of students to schools within reasonable geographic distances of the students' residences. The policy has controlled the allocation of students among the schools in the system for attendance purposes. . . ." (A. 43).
>
> (2) "This central policy has been supported through the years by most Board members and has been of decisive importance in a host of decisions concerning how and where students were and will be educated, including decisions with respect to

new school site selection and construction, school remodeling, school building additions, and actions taken to meet the increased crowding in the schools during the 1950's and early 1960's." (A. 44).

(3) "Board and Administration determinations concerning site selection, building additions, school size, and district boundaries, among others, were made with the knowledge of their racial effect because there was general knowledge as to the racial characteristics of neighborhoods affected by such decisions. The evidence established that with respect to any such decision, alternatives were available which would have resulted in schools which are presently predominantly black having substantially lower proportions of their students nonwhite. *However, these alternatives were not consistent with the neighborhood school policy and, consequently, were not adopted.*" (A. 59) (emphasis added).

(4) "During the period, the Board's fundamental purpose was the maintenance and preservation of the neighborhood school policy. The Board knew that adherence to the neighborhood school policy would result in a high proportion of racially imbalanced schools but believed, in good faith, that such a policy would produce the best possible educational opportunities for all students in the system, regardless of race." (A. 102).

(5) "[E]ven Board members inclined toward affirmative action to attain racial goals agree that the majority Board members' views and decisions to the contrary were not motivated by any desire to discriminate against or otherwise 'shortchange' black students. To the contrary, the majority members had as their objective quality education

for all. From their point of view, quality education required adherence to the neighborhood school policy even though that policy necessitated the creation of segregated schools." (A. 107).

(6) "The gross imbalance in the city's racial residential patterns, superimposed upon the neighborhood school policy, has produced a number of schools which are predominantly white or predominantly black." (A. 110).

The District Court thus either mysteriously changed a uniform and consistent good faith adherence to a racially neutral neighborhood school policy for the educational benefit of all students into a premeditated intent to segregate, or held that the mere application of the policy was unconstitutional.

Additional District Court findings concerning the Board's teacher assignment policies, busing practices, boundary change and school siting decisions, and student transfer policies allegedly support its conclusion of constitutional violation. However, each of the cited practices and policies conformed to the neighborhood school policy, was racially neutral or, as in the case of the open transfer program, deviated from that policy at the specific request of the Milwaukee chapter of the NAACP.[5]

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5. The open transfer program was adopted to promote better racial balance, a result in fact accomplished in some schools. *See* pp. 28-29, *infra*.

Contrary to the allegation of lower educational quality and programs in schools with predominantly black populations, the District Court found that (a) substantially equal educational services were provided to all schools prior to the mid-1960's and (b) subsequent to that time

> "those schools serving the black areas of the city received a greater quantum of such services under the system's compensatory educational program." (A. 90).

D. **Decision of the Court of Appeals**

The Circuit Court's decision imposes an affirmative duty to achieve racial balance in each of the Milwaukee schools, even if it requires abandoning the Board's racially neutral neighborhood school policy.

In affirming the District Court's "conclusory findings of segregative intent" (A. 17), the Circuit Court applied a so-called and unusual "presumption of consistency" in conjunction with the "clearly erroneous" standard of review. The Circuit Court resorted to the "presumption of consistency" because of the "unexplained hiatus" between (a) the District Court's findings of the Board's good faith, consistent and uniform adherence to the neighborhood school policy and (b) its "conclusory findings" of intent to segregate:

> "Defendants here rely on the findings that they 'consistently and uniformly adhered' to a neighborhood school policy, 408 F.Supp. at 780, and that although 'with respect to any such decision, alternatives were available which would have resulted in schools which are presently predominantly black having substantially lower proportions of their students nonwhite, . . . these alternatives were not consistent with the neighborhood school policy and, consequently, were not adopted.' 408 F.Supp. at 788. These findings may be read as meaning that defendants hewed to their neighborhood school policy solely for racially neutral reasons and that the racial effects were not intended as such but were merely an unavoidable result; and, if so read, they cannot be said to be indicative of segregative intent. Here, as elsewhere, there is an unexplained hiatus between specific findings of fact and conclusory findings of segregative intent. The District Court is, however, entitled to a presumption of consistency,

> and we should, therefore, read the findings as elements of a presumably harmonious whole and interpret them as internally consistent when it is possible to do so. Reading the neighborhod-school-policy findings just referred to with the other findings, it is apparent that the former were not meant to describe all cases and that the court did not, as defendants contend, find that their challenged actions were entirely motivated by a racially neutral intent to adhere to a neighborhood school policy." (A. 17).

The result-oriented culmination of the Circuit Court's reconciliation of the findings and conclusion was, in effect, an arbitrary redefinition of "consistent and uniform" to mean "not all the time."

The Circuit Court also imposed an affirmative duty upon school officials to abandon the racially neutral neighborhood school policy to improve racial balance. Though it asserted that the Board failed to adopt programs which would have fostered integration "without violating the neighborhood school policy" (A. 18), it failed to identify even one of those programs. The only possibility alluded to by the Circuit Court was inconsistent with the neighborhood school policy. *See* pp. 23-25, *infra*.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUIT COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, INTENSIFIED A CONFLICT AMONG THE CIRCUITS AND MISAPPLIED APPLICABLE DECISIONS OF THIS COURT; BY INFERRING INTENT TO SEGREGATE, IT HAS MISTAKENLY RELIED UPON (A) BOARD DECISIONS WHICH ARE CONSISTENT WITH THE NEIGHBORHOOD SCHOOL POLICY, (B) RACIALLY NEUTRAL TEACHER ASSIGNMENT POLICIES AND (C)

AN OPEN TRANSFER PROGRAM ADOPTED TO ENHANCE RACIAL BALANCE.

The Circuit Court cast its decision as a routine affirmance of a district court. In fact, the Circuit Court decided two important and unsettled areas of federal constitutional law of overwhelming significance to the City of Milwaukee and the nation by holding that: (1) irrespective of segregative intent, a neighborhood school policy is unconstitutional *per se* if it results in school racial imbalance, and (2) irrespective of segregative intent, school officials have an affirmative duty to lessen racial imbalance in every school in their system.

This case, unlike any other to date,[6] is unique in providing the factual and legal foundation for a decision on the neighborhood school policy issue specifically reserved in *Keyes v. School District No. 1*, 413 U.S. 189, 212 (1973):

> "We have no occasion to consider in this case whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting de jure segregation . . . by techniques that indicate that the 'neighborhood school' concept has not been maintained free of manipulation."

6. *United States v. Texas Education Agency*, 532 F.2d 380 (5th Cir. 1976), *cert. granted, vacated sub nom. Austin Independent School District v. United States*, No. 76-200, December 6, 1976, recently remanded to the Court of Appeals for the Fifth Circuit without opinion, is the only other recent decision presented to this Court which involved in any direct manner the neighborhood school policy question. However, the factual circumstances present in Austin, *e.g.* dual-overlapping attendance zones, *United States v. Texas Education Agency*, 467 F.2d 848, 867 (5th Cir. 1972), are totally absent here. The fact that this Court has dealt with a school desegregation decision so recently should not obstruct the granting of this petition. To permit the error of this case to continue uncorrected will render *Austin* equivocal.

In creating and applying a "presumption of consistency" in its affirmance, the Circuit Court attempted to hide what is plainly true – the District Court's conclusion of a constitutional violation is correct only if good faith adherence to a racially neutral neighborhood school policy is a *per se* constitutional violation. Intact bussing, boundary changes, school siting decisions and all other Board decisions, except one,[7] were in harmony with the neighborhood school policy. Alternative programs which the Circuit Court suggested should have been adopted are inconsistent with the neighborhood school policy and were rejected for that reason as specifically found by the District Court (A. 59).

A. The Circuit Court Decision Highlights a Conflict among the Circuits as to the Meaning of "Intent" under *Keyes*.

This Court's decision in *Keyes* held that proof of purpose or intent to segregate was one of three elements which must be shown to establish a constitutional violation.[8] 413 U.S. at 208. Lower courts have struggled with the application of "purpose or intent to segregate" since *Keyes* and the circuits are likewise in conflict over its proper interpretation.

The Second Circuit in *Hart v. Community School Board of Education*, 512 F.2d 37 (2d Cir. 1975), held that the foreseeable consequences of school officials' actions rather than a racial motivation test meets the *Keyes* intent requirement. The Fifth and Eighth Circuits, and a panel of

7. The exception, the open transfer program, adopted at the instance of the NAACP, is discussed at pp. 28-29 , *infra*.

8. *Keyes* established that *de jure* segregation exists only if (1) school officials administer the school system with acts or omissions "motivated by segregative intent," (2) which substantially cause (3) schools to be presently "segregated" in fact. 413 U.S. at 198, 201, 205-206, 208-209. *See* pp. 29-31 , *infra* for a discussion of the lower courts' misapplication of the *Keyes* "segregation" test.

the Sixth Circuit agree with this interpretation. *United States v. Texas Education Agency*, 532 F.2d 380 (5th Cir. 1976), *cert. granted, vacated sub nom. Austin Independent School District v. United States*, No. 76-200, December 6, 1976; *United States v. School District of Omaha*, 521 F.2d 530 (8th Cir. 1975), *cert. denied*, 423 U.S. 946 (1975); *Oliver v. Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

The Ninth Circuit disagrees; it has consistently held that racial motivation is required. *Berkelman v. San Francisco Unified School District*, 501 F.2d 1264 (9th Cir. 1974); *Johnson v. San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974); *Soria v. Oxnard School District Board of Trustees*, 488 F.2d 579 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974). One panel of the Sixth Circuit also disagrees. *Higgins v. Board of Education*, 508 F.2d 779 (6th Cir. 1974).

This Court in a non-school case recently indicated that a racially discriminatory purpose, rather than statistical discriminatory impact, is required to establish a constitutional violation. Hence, the foreseeability test is inappropriate to establish segregatory intent. In *Washington v. Davis*, 426 U.S. 229, , 96 S.Ct. 2040, 2048 (1976), this Court said:

> "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause."[9]

9. *See also Pasadena City Board of Education v. Spangler*, U.S. (1976), 44 U.S.L.W. 5114 (U.S. June 28, 1976), where it was held that a constitutional violation is not established by the existence of racially imbalanced schools resulting from shifts and racial concentration in housing patterns.

The Circuit Court was well aware of the problem of intent and referred to *Washington* in its decision (A. 13). However, the reference to racial motivation was rhetoric; in fact, its decision and that of the District Court make sense only if a foreseeability test was applied or the Milwaukee neighborhood school policy was unconstitutional *per se*. The effect of the decision, given its rationale and the findings both relied upon and ignored, constitutes a holding of *per se* malintent and unconstitutionality.[10]

B. The Circuit Court Has in Effect Overruled *Keyes* by Equating Segregative Intent with Adherence to a Neighborhood School Policy.

In reserving the neighborhood school policy question in *Keyes*, this Court stated that the manipulation of a neighborhood school policy so as to cause *de jure* segregation may be a constitutional violation. Here, there were no findings of "manipulation," but rather findings of a good faith adherence to a racially neutral neighborhood school policy. The Circuit Court *sub silentio* destroyed the *Keyes* intent test by holding that the requisite intent is present simply because the policy exists.

If the Circuit Court decision stands, school districts throughout the nation whose racially imbalanced schools

10. In *United States v. Texas Education Agency*, The Court of Appeals for the Fifth Circuit held:

> "[S]chool authorities may not constitutionally use a neighborhood assignment policy that creates segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent." 532 F.2d at 392.

Whether by express language or implication, the result is equally erroneous. This Court's decision to grant certiorari and vacate the decision of the Court of Appeals for the Fifth Circuit indicates beyond a doubt the error of automatically equating neighborhood school policy adherence with segregative intent. *See Austin.*

result from a long-standing neighborhood school policy and relatively recent racial housing concentrations will be constitutionally required to abandon the policy. Such an affirmative obligation is also contrary to enacted Congressional policy and should be corrected by this Court so that state and local authorities are not misled.[11] *See* 20 U.S.C. Sections 1701, 1704 and 1705, pp. 4-5, *supra.*

C. The Courts Below Misinterpreted Additional Applicable Prior Law.

Keyes carefully preserved the holding of *Bell v. School City of Gary, Indiana,* 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). The District Court's interpretation of *Bell* discloses the true essence of its decision and the Circuit Court's affirmance. *Bell* held that a neighborhood school policy, honestly and conscientiously constructed, with no intention or purpose to segregate the races, does not violate the Equal Protection Clause, even if the effect is to have racial imbalance in schools because residential areas are populated almost entirely by blacks or whites. It further held that there is no affirmative constitutional duty to change school attendance districts simply because shifts in population either increase or

11 The importance of the resolution of the issues here presented is disclosed by the decision of the District Court for the Northern District of California in *Diaz v. San Jose Unified School District,* 412 F.Supp. 310 (N.D. Cal. 1976), which is currently on appeal to the Court of Appeals for the Ninth Circuit, *appeal docketed,* No. 76-2148, 9th Cir., May 24, 1976. If the Circuit Court decision here is permitted to stand, and if the Ninth Circuit follows its prior decisions and affirms *Diaz* by holding that racial motivation is required to establish a constitutional violation, school officials will be faced with yet another conflict in the decisions of the circuit courts, for *Diaz* held that the consistent neutral adherence to a neighborhood school policy is not a constitutional violation, even if racially imbalanced schools result. 412 F.Supp. at 334.

decrease the percentages of black or white students in particular schools. 324 F.2d at 213.[12]

The District Court acknowledged the holding of *Bell,* but concluded that:

> "[A] 'neighborhood school system' would be beyond serious constitutional attack if, and only if, the schools in the system remained essentially the same with respect to most of the factors mentioned in *Keyes*, such as teachers, facilities, staff, and boundaries.
>
> * * *
>
> "But as soon as school officials start to make changes in school site locations, school sizes, school renovations and additions, school attendance zones, assignment and transfer options, transportation of students, assignments of faculty and staff, etc., their actions become . . . 'constitutionally suspect.'
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> * * *
>
> "In Milwaukee, none of these decisions ever resulted in any significant or noticeable degree of desegregation in the school system, and practically all of them resulted in greater segregation." (A. 128-129).

The rapid student population changes of the fifties and sixties forced every large American school system, including

12. The principles expressed in *Bell* have been subsequently reaffirmed. *See, e.g., Milliken v. Bradley,* 418 U.S. 717, 740-741, 747, n.22 (1974); *Spencer v. Kugler,* 326 F.Supp. 1235, 1243 (D. N.J. 1971), *aff'd,* 404 U.S. 1027 (1972); *Lawlor v. Board of Education,* 458 F.2d 660, 662 (7th Cir. 1972), *cert. denied,* 413 U.S. 921 (1973).

the Gary, Indiana system challenged in *Bell*, to undertake new school construction, change faculty assignments and adopt temporary measures in response to overcrowding. 324 F.2d 211-212. Under the District Court's restrictive interpretation of *Bell*, the neighborhood school policy of each of those systems is "constitutionally suspect."

The fact that racial balance did not result from Board decisions consistent with the neighborhood school policy does not prove that the Board acted with an intent to segregate.[13] Site selection, boundary changes and other similar decisions which are consistent with a neighborhood school policy but do not eliminate racial imbalance are evidence of segregative intent only if adherence to the underlying policy is *per se* evidence of that intent. If that is so, all neighborhood school policies in cities with racially concentrated housing patterns are unconstitutional. Such a decision emasculates the distinction between *de jure* and *de facto* segregation which was preserved in *Keyes*.[14]

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13. In *Diaz v. San Jose Unified School District*, 412 F.Supp. 310 (N.D. Cal. 1976), the court made findings amazingly similar to those made by the District Court here, and concluded that segregative intent had not been shown. After reviewing site decisions and school construction decisions, boundary assignment practices and the board's failure to take affirmative steps to "integrate," the court stated:

> "The court finds that the district has consistently adhered to a neighborhood school policy. The board has applied this policy neutrally: the record discloses no attempts to gerrymander attendance boundaries or otherwise manipulate attendance areas to lock in minorities or freeze segregated school patterns.
>
> . . .
>
> "The court may disagree with the policy of the board in pursuing other educational goals over improved ethnic balance. If, however, neutral adherence to a neighborhood school policy is constitutional, this court has no authority to intervene and order integration." 412 F.Supp. at 334.

14. Mr. Justice Powell would have abolished the distinction

(Footnote continued)

D. This Petition Should Be Granted because the Circuit Court Mistakenly Inferred Segregative Intent from: (a) Board Decisions Consistent with the Neighborhood School Policy, (b) Racially Neutral Teacher Assignment Policies and (c) an Open Transfer Program Adopted to Enhance Racial Balance.

1. ***Boundary changes conformed to the neighborhood school policy.***

The District Court found that: (1) the Milwaukee Board adhered to the neighborhood school policy uniformly and consistently (A. 43); (2) the essence of this policy has been the assignment of students to schools within reasonable geographic distances of their residences, with attendance zone radii based upon numerous practical (non-racial) criteria (A. 43); (3) the policy has controlled the allocation of students among the schools for attendance purposes (A. 43) and alternatives inconsistent with this policy were rejected for that reason (A. 59); (4) this policy has been of decisive importance in deciding how and where students were and will be educated (A. 44); (5) boundary changes were primarily made to meet increasing or shifting student populations or changing school capacities (A. 47-48); (6) the boundary changes transferred pupils from overcrowded schools to adjacent schools having available space so as to avoid, in the face of population shifts, overcrowding or under-utilization of buildings (A. 48); and (7) there was no direct relationship between the student body racial percentages of the receiving and losing school affected by boundary changes (A. 49).

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between *de jure* and *de facto* segregation. *Keyes*, 413 U.S. at 224. He would have further limited the scope of remedial steps so as to include a concern for "legitimate community and individual interests in framing equitable decrees." *Id.* at 253. He advocated that a "more flexible and reasonable" remedial standard be applied. *Id.* While district courts have relied upon Mr. Justice Powell's concern about proof problems under the varying standards for southern and northern cases, his statements on remedy have been for the most part ignored. This problem will hopefully be alleviated in light of the concurring opinion of Justices Burger, Powell and Rehnquist in *Austin*.

The District Court further found that the basic policy with regard to boundary changes was to act consistently with the underlying commitment to the neighborhood school policy (A. 48). Indeed, the Board refused to undertake "domino" type boundary changes precisely because they would have been inconsistent with that policy (A. 49).[15] The pattern and practice was a resolute application of neutral criteria. These findings preclude any possible inference of segregative intent.

Nevertheless, the Circuit Court sustained the conclusion of segregative intent by relying upon an unsupportable finding of the District Court based on a study of 63 boundary changes which were made between 1950 and 1968. The conclusions, contained in Exhibit 374, were based upon information orally collected piecemeal by the plaintiffs' chief witness from unidentified persons as to racial composition of various city blocks many years prior to the date upon which the data was collected. Only schools which had student bodies more than 50 percent black as of 1967-1968 were involved – there was no comprehensive analysis of all boundary changes during the time period in question.

Even if one were to assume that the study has some validity and probative value, the District Court found that only 29 of the 63 (46%) boundary changes arbitrarily selected for study over an 18-year period increased the concentration of black students (A. 4, 112). Approximately 44 percent of the boundary changes had no effect on the concentration of black students. Hence, it was improper for the Circuit Court to infer segregative intent even from this unreliable boundary change study.

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15. "Domino" type boundary changes would involve a series of boundary changes in three or more contiguous districts ultimately placing students in the most distant school in the series (A. 49). "This was rejected because it was incompatible with the neighborhood school policy and would ultimately compel children to attend schools far from their homes." (A. 49).

Aside from study unreliability, both the District and Circuit Courts ignored the fact that the evidence conclusively shows the Board was completely unaware of the racial makeup of blocks involved in boundary changes. Block by block racial statistics were not available, considered or used by school personnel. Even if the casually collected statistics of Exhibit 374 have probative value, no basis exists for concluding boundary change decisions were motivated by intent to segregate or even were made with knowledge of racial consequences.

Racial imbalance in neighborhood schools followed closely upon black residential concentration. The fact that Milwaukee's boundary changes did not eliminate racial imbalance does not prove segregative intent. Racial balance could have been achieved only if the Board had abandoned its neighborhood school policy in response to the overcrowding and expansion problems which it faced during the 1950's and 1960's.

As student population density increased, boundary changes were needed to prevent overcrowding. Such changes were made by contracting attendance zones in conformity with neighborhood school policy principles. If a negative inference is drawn from these facts, the neighborhood school policy is *per se* unconstitutional.

Although the Circuit Court held that the Board consistently failed to choose policy options which would enhance racial balance "without violating the neighborhood school policy" (A. 18), it did not identify any options consistent with that policy. Rather, the Circuit Court suggested boundary change options *inconsistent* with the neighborhood school policy.

In footnote 15 to its opinion, the Circuit Court discussed a boundary change example involving Walnut and Center Street Schools (A. 18). The example incorrectly assumed that those schools were overcrowded and then

stated that the Board had at least three options in making required boundary changes:

> "[T]hey could have transferred only a few blocks closest to the white school to that school, even though those blocks were predominantly white; they could have transferred those blocks and additional blocks containing black students, assuming we are right in concluding that there was room to accommodate additional students; or if we are wrong about that, they could have transferred blocks containing blacks instead of blocks containing whites." (A. 18, n. 15).

In clear conformity with the neighborhood school policy, the Board adopted the first option. The second option assumes, without justification, that there was room in the "receiving" school to accommodate additional students. Even if this were true, there was no necessity to transfer additional blocks. The overcrowding problem was alleviated by shifting the blocks closest to the transferee school. The Circuit Court suggestion is the imposition of an affirmative duty to promote racial balance at the expense of a neighborhood school policy. This is not the law.

The third option required blatant gerrymandering since blocks closest to the school would have been passed over in order to include more distant blocks with a higher black population. At no time did the Board engage in such gerrymandering for *any* reasons.

The option adopted by the Board for the Walnut and Center Street Schools was the option consistent with the neighborhood school policy. The suggestion that an acceptable alternative was to transfer blocks further away because such transfer would improve racial balance discloses that the Circuit Court is rejecting the neighborhood school policy, and is requiring that school officials change that policy to pursue racial balance.

The Board's discretion in applying its neighborhood school policy does not support an inferential conclusion of segregative intent. The Circuit Court, without factual foundation, mistakenly assumed the existence of options consistent with both the neighborhood school policy and increased racial balance.

2. ***Intact busing is a natural extension of the neighborhood school concept.***

The Circuit Court inferred segregative intent from, *inter alia*, so-called "intact busing" (A. 16) of classes temporarily displaced from their neighborhood school by overcrowding or remodeling.[16] In instances of classroom shortage, the class and its teacher went from their neighborhood school to a school having an available classroom, usually for one semester or less for remodeling or one year for overcrowding (A. 7, 8, 61, 62). A large number of white students were bused by the intact method (A. 65-66). Indeed, the initial use of such busing involved white students in the early 1950's prior to overcrowding in predominantly black schools. The intact practice continued to involve white students until it was no longer used.

Intact busing is a temporary measure which is consistent with the neighborhood school concept. It has educational, administrative, efficiency and economic advantages (A. 61-62), and it permitted the bused students and their teachers to continue to identify with the neighborhood schools to which they would return after the short term overcrowding was corrected or remodeling completed (often in mid-semester). Placing the students into multiple classes at the "receiving" school and reassigning them to their

16. "Intact busing" is a misnomer because it implies a complete separation of students. In Milwaukee, students bused by the intact method mixed with receiving school students during recess periods, lunch programs and school assemblies. This was specifically found by the District Court (A. 61), but ignored by the Circuit Court. Such practices are hardly indicative of a segregative motive.

neighborhood school shortly thereafter would have caused needless trauma. Further, in pure overcrowding instances, such actions would have severed the students' connection with their neighborhood schools. To infer intent from the intact busing policy, with its obvious history, purpose and application without regard to race, is inappropriate.

It is illogical to conclude as did the Circuit Court (A. 16), that intact busing is evidence of segregative intent simply because in one case it was called one of the "commonly used or classic segregative techniques." *Higgins v. Board of Education*, 508 F.2d 779, 787 (6th Cir. 1974). Such arbitrary classification bypasses the intent to segregate requirement, for an adverse inference, regardless of motivation or purpose, could be drawn whenever the policy was used. The Circuit Court's statement discloses a misunderstanding of the *Keyes-Washington* intent standard and illustrates its generally simplistic approach in reviewing the District Court decision.

The Circuit Court also based its inference of segregative intent upon those exceptional instances where intact busing was used for more than a few semesters. The Circuit Court relied upon the District Court finding that those exceptions involved "elementary schools which tended to be predominantly black" (A. 8, 64). The inference is unwarranted. There is no finding or evidence that the same students at the same grade levels were bused over extended periods of time and no finding or evidence that the sending schools either transported students to the same receiving schools each year or that there was space available in the same receiving schools. The absence of such findings or evidence discloses that an alternative method of busing would not have been viable. Further, four of the sixteen schools (25%) involved in intact busing for more than a few semesters were predominantly white schools.

3. The Board's racially neutral teacher assignment policies were required by non-racial circumstances beyond the Board's control and do not evidence segregative intent.

The Circuit Court concluded that the Board must "bear some part of the responsibility for the teacher imbalance," (A. 10) because "[i]t could . . . have been inferred that teacher assignments not governed by the collective bargaining agreement were not made in accordance with racially neutral principles." (A. 17). This conclusion was apparently premised in large part upon testimony not relied upon by the District Court in making a finding concerning teacher assignment. The Circuit Court overlooked the contrary testimony of a Board employee responsible for teacher staffing whose testimony *was* incorporated into a finding (A. 75). Further, even the Circuit Court acknowledged that "the primary cause of the racial imbalance was the priority given under the collective bargaining agreement to transfer requests by teachers with seniority. . . ." (A. 10), and the District Court found that the "agreements have generally barred involuntary reassignments" (A. 77). When the Board attempted to regain some of their reassignment rights, the "teachers would have struck to prevent insertion of such provisions in the contract" (A. 77).

In addition, thy Circuit Court ignored the importance of the following findings:

(1) Teachers, black and white, were in short supply in early and mid-1960's (A. 72);

(2) Since at least the early 1960's, heavy emphasis has been placed on recruiting minority teachers, principals and administrators; this program was only moderately successful due both to a shortage of those teachers and the great demand for them (A. 72-73);

(3) Significant progress in the recruitment program has occurred in recent years as a result of increasing numbers of black teachers (A. 73-74);

(4) The scarcity of qualified teachers required the Board generally to honor teachers' personal needs and desires concerning initial assignment (A. 76);

(5) The Board attempted to persuade teachers not to transfer out of schools when this would harm faculty racial balance (A. 77); and

(6) "There has never been any effort to keep black teachers from teaching in predominantly white schools." (A. 79).

Given these specific findings and the Circuit Court's arbitrary reliance on the testimony of one Board member which was not made a finding of fact, the Circuit Court's inference that teacher assignments evidenced segregative intent is without foundation.

4. ***The open transfer policy was adopted at NAACP urging and caused improved racial balance in some schools and greater imbalance in others. It does not evidence segregative intent.***

The Circuit Court also inferred segregative intent from the Board's adoption and maintenance of an open transfer policy (A. 16). This program permitted students upon request to transfer from their neighborhood school to any Milwaukee school with available space, on a first come, first serve basis. The policy was adopted in 1964 at the request of the National Association for the Advancement of Colored People (NAACP) and a black member of the Board, Mr. Golightly (A. 8, 67, 68), in the hope of enhancing "racial integration" (A. 68). The Circuit Court recognized that the policy was adopted for a proper purpose, and further noted

that it had a "mixed racial impact" (A. 9).

The District Court improperly concluded that the open transfer policy was a substantial cause of segregation even though there were only "eight instances in which the transfer policy substantially affected an elementary or secondary school's racial composition" (A. 9). Its conclusion is based upon a 1972 study of the effects of open transfers on racial balance. The study also discloses that student body racial percentages at 53 of the system's approximately 160 schools (33%) were *improved* by the use of open transfers. Both the District and Circuit Courts acted improperly in inferring segregative intent from an open transfer policy which (a) was adopted at the request of the NAACP to enhance "racial integration," (b) adversely affected racial balance in only 5% of the system's schools, and (c) had a positive racial balance effect at 33% of the schools.

Finally, as there is no evidence that the Board knew that the open transfer policy was affecting racial imbalance in any school until the 1972 study was released, and the resulting imbalance did not affect the system as a whole, its maintenance is an insufficient basis from which to infer segregative intent. Through hindsight, the Board has been condemned for an action initially adopted to, and which in fact did, enhance racial balance. Both the condemnation and the inference are unsupported.

II. THE CIRCUIT COURT IGNORED THE MEANING OF SEGREGATION ADOPTED IN *KEYES* BY EQUATING RACIAL IMBALANCE WITH SEGREGATION AND REQUIRED INORDINATE REMEDIAL ACTION.

A further reason for this Court to issue a writ of certiorari is a need to clarify the standard for proving "segregation." To prove segregation, the following factors are to be considered:

> "In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitude towards the school, *must be taken into consideration*." *Keyes*, 413 U.S. at 196 (emphasis supplied).

The District Court did not find any school to be "segregated" as defined in *Keyes*. Contrary to the *Keyes* directive, both Courts relied solely upon statistical evidence in concluding that segregation existed. The Circuit Court stated:

> "The statistical evidence, without more, shows that the system is in substantial part segregated in fact." (A. 12).

This departure from *Keyes* is exacerbated by the Circuit Court's conclusion that the system is "*in substantial part* segregated in fact," despite the District Court's remedial requirement that the system *as a whole* must be desegregated (emphasis added). There is no judicial power to remedy that which does not violate the Constitution. The conclusion that some schools are segregated does not justify a similar conclusion as to all schools, and certainly does not support a remedial decree which requires a racial quota at every school.[17]

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17. The District Court ordered that all schools in the system shall have student populations between 25% to 45% black, with one-third of the schools to reach this goal by September of 1976, and the middle and final thirds to meet the required percentages, respectively, by September of 1977 and 1978 (A. 143-144).

The following comment from the concurring opinion in *Austin* is equally applicable here:

> "[T]he remedy ordered appears to exceed that necessary to eliminate the effect of any official acts or omissions. The Court of Appeals did not find and there is no evidence in

(Footnote continued)

As stated in *Brown v. Board of Education*, 349 U.S. 294, 300 (1954): "[i]n fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." The finding of a violation in one portion of a school system does not permit an equity court to order its perception of an ideal remedy in all schools. While there is broad power to remedy past wrongs, and to correct the condition that offends the Constitution, "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). Congress has also indicated that the remedy must be limited to the violation. *See* 20 U.S.C. Section 1712, p. 5, *supra*.

III. THE PRESUMPTION OF CONSISTENCY ARBITRARILY REJECTS DISTRICT COURT FINDINGS WHICH MANDATE A LEGAL RESULT CONTRARY TO THAT REACHED BY THE DISTRICT COURT.

The Circuit Court resolved the dilemma of an "unexplained hiatus" between the District Court's "specific findings of fact" and its "conclusory findings of segregative intent" (A. 17) by creating a "presumption of consistency."[18] *See* pp. 12-13, *supra*, (A. 17). In so doing, the Circuit Court conveniently dissolved findings of fact requiring a reversal. It thus preempted the District Court's role as the trier of fact.

Through the "presumption of consistency," the Circuit Court ignored the key finding of the District Court that the

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> the record available to us to suggest that, absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan.
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> . . .
>
> "Thus, large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past."

18. Counsel for petitioners were unable to find a single instance

(Footnote continued)

Board had "uniformly" and "consistently" adhered to the neighborhood school policy. The word "uniform" is defined as "marked by complete conformity to a rule or pattern or by similarity in salient detail or practice," and the word "consistent" is defined as "marked by harmony, regularity, or steady continuity throughout: showing no significant change, uneveness, or contradiction." Webster's New International Dictionary (3d ed.). The decision making process employed by the Circuit Court repudiates the District Court's language by concluding that "consistently" and "uniformly" do not mean what they say.

If a presumption of consistency is proper in an appellate review context, it must be used to harmonize the inconsistencies. Here, in the guise of harmonizing, the Circuit Court in fact negated a specific District Court finding, for there was no way to harmonize that finding with the conclusion of segregative intent.

The "presumption of consistency" has no foundation in the law, and, in the context here employed, with good reason. If such appellate court practice was permitted, courts would have unfettered discretion to reach a desired result without constraint by findings inconsistent with that result. The presumption improperly insulates from meaningful appellate review erroneous district court conclusions. The Circuit Court "has so far departed from the accepted and usual course of judicial proceedings . . . [that] an exercise of this court's power of supervision [is called for]." Supreme Court Rule 19.

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where an appellate court has relied upon the device created by the Circuit Court.

IV. THE APPLICATION OF THE CLEARLY ERRONEOUS STANDARD OF REVIEW TO ULTIMATE AND CONCLUSORY FINDINGS IS IN CONFLICT WITH THE RULE IN OTHER CIRCUITS AND SHOULD BE OVERRULED HERE.

In affirming the District Court's "conclusory findings of segregative intent" (A. 17), the Circuit Court improperly applied the "clearly erroneous" standard of review.[19] Its use of that standard conflicts with decisions of other circuits concerning the appropriate standard of review of ultimate and conclusory findings based upon inferences from basic facts. Among such holdings are the following:

> *Joseph Lupowitz Sons, Inc. v. Commissioner of Internal Revenue*, 497 F.2d 862, 865 (3d Cir. 1974);
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> *Hester v. Southern Railway Co.*, 497 F.2d 1374, 1381 (5th Cir. 1974);
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> *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 423 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972);
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> *Philber Equipment Corp. v. Commissioner of Internal Revenue*, 237 F.2d 129, 131 (3d Cir. 1956).

As stated in *Lupowitz:*

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19. District Court factual findings may not be set aside unless they are "clearly erroneous," i.e. unless upon reviewing all of the evidence the appellate court is "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

> "[Appellant] challenges not the basic facts found . . . but its ultimate finding of fact, [footnote omitted] which represents an inference drawn from the basic facts. It is settled that *such an ultimate finding is reviewable as an issue of law and is not subject to the clearly erroneous rule.*" 497 F.2d at 865 (emphasis added).

The Circuit Court's reliance on *United States v. Board of School Commissioners*, 474 F.2d 81 (7th Cir. 1973), *cert. denied*, 413 U.S. 920 (1973) for the proposition that the "clearly erroneous" test was the appropriate one is in error, for the proper standard of appellate review of ultimate and conclusory findings based upon inferences from basic facts was apparently neither briefed nor considered therein. This Court should correct the Circuit Court's misapprehension of the law and the resultant conflict between circuits.

V. A DISTRICT COURT'S URGENT IMPOSITION OF REMEDY SHOULD NOT DENY APPEAL RIGHTS.

This action was commenced in 1965, tried in late 1973 and early 1974 and decided in January of 1976. Notwithstanding this lengthy history, the District Court demanded the fashioning of an immediate remedy, and the Circuit Court refused to stay remedial action.[20]

The deprivation of more than cursory appellate review in cases like the instant one by imposing immediate relief should not be condoned. Meaningful appeal is denied if limited in any way because a remedy is in process.[21] This

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20. Application for a stay was filed on May 13, 1976, and denied on May 20, 1976.

21. It may have been for just such reason that Congress in adopting 20 U.S.C. Section 1752, p. 5 , *supra*, provided that district court orders requiring the transportation of students for racial balance purposes shall be postponed until appeal rights have been exhausted.

Court should review this case on the merits even though the District Court forced initial implementation before the processing of timely appeal procedures. Unlike the experience in some American cities, Milwaukee school officials have peacefully commenced restructuring their school system under court supervision. If anything, their respect for the law is even more reason for an in-depth review of the Circuit Court's decision.

Prior to the District Court's decision on liability, the Board initiated development of a voluntary integration program based upon educational incentives. The Board adopted a "Statement on Education and Human Rights" on September 2, 1975. Since the first phase of the remedial program approved by the District Court was primarily based upon the voluntary educational incentive program which the Board had adopted prior to decision, a reversal of the Circuit Court decision will have little effect on Milwaukee's present programs.

CONCLUSION

Recent American history makes clear that a federal court conclusion of unconstitutional public school segregation must be based on clear and specific consistent findings. The District Court's conclusion of segregative intent in the instant case does not meet that test. Even a brief reading of the District Court's findings of fact reveals that the racial imbalance in the Milwaukee Public Schools resulted solely from the Board's good faith adherence to a racially neutral neighborhood school policy and non-governmentally caused racial residential concentration. As a matter of law, this cannot constitute the requisite intent to segregate unless a racially neutral neighborhood school policy which results in some racial imbalance is *per se* unconstitutional.

Nevertheless, relying on an improper standard of review and a novel concept called a "presumption of consistency," the Circuit Court affirmed the District Court's ultimate conclusory finding of segregative intent. Even if a

"presumption of consistency" is appropriate in some cases decided by a district court, it has no place in a case where the judicial branch takes continuing jurisdiction of and extensively restructures a public school system. Public confidence in the even-handedness of the appellate process in a case of such far-reaching social consequences requires something more substantial than appellate presumptions and reliance on only selected portions of the record and selected lower court findings of basic facts.

The relationship of Milwaukee residents to their neighborhood schools traditionally has been a great source of stability and strength for the City. In a time of increasing citizen alienation from government at all levels, the forced dismantling of neighborhood school relationships by the federal judiciary should be undertaken only in the clearest of cases.

For economic and educational reasons, the neighborhood school policy dominates school districts throughout the nation. If the policy is unconstitutional *per se* because of non-governmentally caused racial residential concentration, let the word go forth immediately. Conversely, if the policy is constitutional in such a context, that too should be declared.

Petitioners pray that a Writ of Certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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